

Exhibit OMR4

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER, JUDGE PRESIDING

NEUROGRAFIX,	:	
	:	
PLAINTIFF,	:	
	:	
VS.	:	NO. LA10CV01990-MRP
	:	
SIEMENS MEDICAL SOLUTIONS USA,	:	
INC., ET AL.,	:	
	:	
DEFENDANTS.	:	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

THURSDAY, MAY 26, 2011

MARK SCHWEITZER, CSR, RPR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
181-H ROYBAL FEDERAL BUILDING
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1 Appearances of Counsel:

2

3 For the Plaintiff:

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12 For the Defendant:

13 GREGG LO CASCIO, AAL
14 SEAN McELDOWNEY, AAL

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1 those are also indefinite as a result, and they are
2 collectively invalid. We sought agreement from the plaintiff
3 that they would cede that point. For some they have. For
4 those I expect we could file an agreed-to summary judgment
5 motion with invalidity on those claims.

6 With respect to the other claims that your Honor
7 found indefinite, primarily the step plus function claims, as
8 I understand it, plaintiffs disagree not just to the point of
9 disagreeing that they would appeal later, but disagree that
10 they want to reargue the issue with your Honor. So I gather
11 that would be a contested motion for summary judgment that
12 would need to be filed.

13 And then with respect to the first set of claims,
14 claims 1 to 35, we believe your Honor's construction itself
15 renders those valid. So we would seek immediate summary
16 judgment on that. There would still be a very narrow group of
17 claims left limited to the algorithms identified in your
18 Honor's decision. The discovery needed on that is much
19 narrower obviously than on all the claims, and so it seems
20 prudent from the defendant's perspective that there is no
21 argument. And if there is, I expect it will be made in
22 response to those motions as to why the bulk of the claims and
23 issues fall out of the case, as they sometimes do, as a result
24 of claim construction.

25 THE COURT: All right. Now, then, let's hear from

1 you, Mr. Fenster.

2 MR. FENSTER: Your Honor, this is Mark Fenster. We
3 actually disagree, as you might imagine, with Mr. Lo Cascio's
4 rendition in some respects. With respect to the independent
5 claims for the means plus function, claims 55 and the
6 dependents that you found indefinite, while we reserve our
7 rights on appeal, we do agree and can move forward on summary
8 judgment with respect to those claims. With the -- there are
9 some issues that we do want to revisit, and I'll go over those
10 in a minute.

11 With respect to the claims 1 through 35, those
12 claims are very much in the case. The definition of nerve
13 does not set up the claims for summary judgment of invalidity-
14 for several reasons. One, the nerve that Mr. Lo Cascio is
15 relying on that's discussed in the Hajnal reference does not
16 meet the Court's definition of peripheral nerve. Even if it
17 did, there are other limitations in claims 1 through 35 that
18 are undisputedly not met by Hajnal. For example, claim 1
19 requires analyzing for information representative of fascicle,
20 claim 18 requires that the nerve had epineurium and
21 perineurium which the nerve at issue in Hajnal did not. And
22 there are other elements in the other independent claims from
23 1 through 35 that are clearly not met by Hajnal, even if they
24 were correct with respect to that nerve in the brain being
25 within the Court's definition of peripheral nerve, which it is

1 not.

2 So while we'll certainly address and deal with any
3 motion for summary judgment on invalidity, it should not hold
4 up discovery. This is not -- it's not a strong motion, and
5 it's one that should not hold up discovery and hold up the
6 case, particularly given that we have claims 54, and it's
7 dependent to proceed on.

8 The other issue which Mr. Lo Cascio I think did not
9 address is the one raised by the Court in the Court's claim
10 construction order regarding conspicuity. And we would seek
11 resolution of the claim construction issue on conspicuity, and
12 we would like to set up the opportunity to do that earlier in
13 the case rather than later. We think that defendants simply
14 didn't meet their burden and would not be able to meet their
15 burden, but the selection of the region of interest is a
16 subjective matter, but rather is one that is done routinely
17 and repeatedly and that the definition based on a definition
18 of ROI is as specific as the art allows and therefore meets
19 the federal circuit's definition and certainly is not
20 something that can be decided on summary judgment against us.
21 So we would like that -- I think it makes sense to proceed on
22 that so we can get a good definition --

23 THE COURT: Well, Mr. Fenster, tell me specifically
24 what kinds of motions and how you're going to do this.

25 MR. FENSTER: Well, I thing our motion, I think that

1 expedited. What I'll probably suggest to Mr. Fenster and
2 telegraph it now is that simultaneous with that window, other
3 claims that we agree should fall out or we may have a
4 disagreement whether the Court's existing order renders those
5 claims invalid, I think we ought to brief that as well --

6 THE COURT: Now, wait a minute. I am not going to
7 now go revisit everything that's been done in the claim
8 construction order.

9 MR. LO CASCIO: I'm certainly not suggesting and I
10 apologize that was unclear. I don't think a single thing in
11 your Honor's construction should be reconsidered or reargued
12 at this point. What I was suggesting is because of the order,
13 there are claims that are now out as invalid.

14 THE COURT: Yes, that's right.

15 MR. LO CASCIO: And I'm suggesting that what we do
16 at this same time or as soon as Mr. Fenster's calendar allows
17 us, that be presented to your Honor so that summary judgment
18 where appropriate can be granted, and as soon as conspicuity
19 can be dealt with, we really do know at that point what's
20 left, if anything, in this case.

21 THE COURT: Well, you can try that out on
22 Mr. Fenster. I think that's a good way to proceed. Let's
23 see if you can work that out. But I don't think -- I really
24 think, Mr. Fenster, until we get the substance of the case
25 worked out, you should not be looking at their customers or

1 the damages issue.

2 MR. FENSTER: I'm absolutely fine with that, your
3 Honor. I think that the discovery that is absolutely in the
4 case regardless of what happens is the discovery regarding,
5 you know, Siemens's own discovery regarding their own
6 products, and I'm happy to hold off on damages related to
7 discovery and discovery from their customers until after we
8 resolve the issues regarding claims 1 through 35.

9 THE COURT: All right. Now, with the caveat that
10 I'm not revisiting the claim construction. I will come back
11 with you and do it again on conspicuity, but I'm not going to
12 be looking at reargument of all of the other things that were
13 done. So do, please, as I suggested. Give me a report on
14 Friday next about what it is you want to do, and when I read
15 the report -- and the dates on which you want to do it, and
16 when I read it, I'll be back in touch with you.

17 MR. FENSTER: Yes, your Honor. Your Honor, this is
18 Mark Fenster again. And I understand that your Honor put in a
19 tremendous amount of work into the claim construction order,
20 and I understand the Court's comments that it does not intend
21 to revisit any of the claim construction issues. There is one
22 narrow issue that in my view did get short shrift, both in the
23 briefing and was not even addressed really in the hearing.
24 And that is the step plus function. We would ask the Court
25 allow us to file a motion for reconsideration with respect to

1 that. It's a very narrow issue. I think that it is just
2 contrary to the existing federal circuit law, and if we're not
3 able to resolve it with the Court, it's basically going to
4 take those claims out forever because we won't get to appeal
5 until the patent has expired on it. And it's a very narrow
6 issue, and it's frankly one that was not argued at the
7 hearing. And it wasn't given a lot of attention in the briefs
8 because it was kind one of the tertiary or --

9 THE COURT: Well, I'm up for that, and you see if
10 Mr. Lo Cascio is.

11 MR. FENSTER: Thank you, your Honor.

12 THE COURT: I wouldn't mind that being done.

13 So now, give me a report on Friday next, and then
14 we'll get back together again probably.

15 MR. FENSTER: Thank you, your Honor.

16 THE COURT: Thank you for being on the phone.

17 MR. LO CASCIO: Thank you, your Honor.

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19 (Proceedings concluded at 2:00 P.M.)

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C E R T I F I C A T E

I hereby certify that pursuant to Title 28,
Section 753 United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings in the above matter.

Certified on September 2, 2011.

/S/ MARK SCHWEITZER
MARK SCHWEITZER, CSR, RPR, CRR
Official Court Reporter
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